



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-115

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Brain Injury Rights Group, Ltd., attorneys for petitioners, by John Henry Olthoff, Esq.

Judy Nathan, Esq., Interim Acting General Counsel, attorneys for respondent, by Brian Davenport, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which, among other things, denied their request to be reimbursed for their son's tuition costs at the International Institute for the Brain (iBrain) for the 2019-20 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student presents with significant global delays, is nonverbal and non-ambulatory (Parent Exs. C at pp. 1-2; N at pp. 1-2). He has received several diagnoses including cerebral palsy, spastic quadriplegia, microcephaly, and dysgenesis of the corpus collosum (Parent Exs. C at p. 1; N at p. 1; Dist. Exs. 2 at p. 1; 19 at p. 4). The student received special education instruction and related services in a district special class in a specialized school from kindergarten (2006-07) until January 2020, when he was unilaterally placed at iBrain (Parent Exs. A at pp. 1, 2; B at p. 1; N at p. 1).

The CSE convened on November 20, 2017, to develop the student's IEP for the 2017-18 school year (Parent Ex. B). The November 2017 CSE found the student remained eligible for special education and related services as a student with multiple disabilities, and recommended he attend a

12-month, 12:1+(3:1) special class in a specialized school (*id.* at pp. 1, 10, 11, 15).¹ Additionally, the November 2017 CSE recommended the student receive three 30-minute sessions of individual occupational therapy (OT) per week ; five 30-minute sessions of individual physical therapy (PT) per week; and three 30-minute sessions of individual speech-language therapy per week (*id.* at pp. 10-11). The November 2017 CSE also recommended additional related services consisting of two 60-minute sessions of individual OT and two 60-minute sessions of speech-language therapy, to be provided outside of school (*id.* at p. 11). The November 2017 CSE further recommended that the student receive adapted physical education, the support of a full time 1:1 paraprofessional for health and feeding, and a dynamic display speech generating device (SGD) to be integrated into the student's existing school program (*id.*).

The CSE convened on December 4, 2018, to develop the student's IEP for the 2018-19 school year (Dist. Ex. 12). The December 2018 CSE found the student remained eligible for special education and related services as a student with multiple disabilities and recommended that he attend a 12-month program in a 12:1+(3:1) special class in a specialized school, along with the related services of three 30-minute sessions of individual OT per week, two 30-minute sessions of OT in a small group (2:1) per week, five 30-sessions of individual PT per week, and three 30-minute sessions of individual speech-language therapy per week (*id.* at pp. 1, 19, 23). The December 2018 CSE also recommended individual speech-language therapy to be provided outside of school for three 60-minute sessions per week, (*id.* at p. 11). Additionally, the December 2018 CSE recommended that the student received adapted physical education, the support of a 1:1 paraprofessional for health and feeding (.8), and a dynamic display SGD to be integrated into the existing school program (*id.* at pp. 17, 19).

The CSE convened on November 26, 2019, to develop the student's IEP for the 2019-20 school year (Parent Ex. D). Finding the student remained eligible for special education and related services as a student with multiple disabilities, the November 2019 CSE recommended that the student attend a 12-month, 12:1+(3:1) special class in a specialized school with related services including: two 30-mnute sessions per week of individual OT; three 30-minute sessions per week of OT in a small group (2:1); five 30-minute sessions of individual PT per week; and three 30-minute sessions of individual speech-language therapy per week (*id.* at pp. 1, 7, 8, 11). The November 2019 CSE recommended an additional three 60-minute sessions of speech-language therapy per week to be provided outside of school (*id.* at p. 7). Further, the November 2019 CSE recommended that the student received adapted physical education, the support of a 1:1 paraprofessional for health and feeding (.8), and a dynamic display speech generating device (SGD) to be integrated into the existing school program (*id.* at pp. 8). The November 2019 CSE also recommended the student receive the following modifications and accommodations: repetition of activities, math manipulatives, and repeated prompts (*id.*).

On December 16, 2019, the parents executed an enrollment contract with iBrain along with a transportation contract (Parent Exs. F at p. 7; I at p. 5). According to the terms of the contracts,

¹ At times during the hearing, the parties and IHO described the recommended class as a 12:1+4 special class; however, as noted in the IEP, the recommended special class was described as a 12:1+(3:1), and will be referenced as a 12:1+(3:1) throughout this decision.

the student began attending iBrain on January 2, 2020, and received transportation between the student's home and the school (Parent Exs. F at p. 1; I at p. 1).

On January 2, 2020, the parents, through their attorneys, provided the district with written notice of the parents' unilateral placement of the student at iBrain and their desire to seek public funding for the placement (Parent Ex. K).

A. Due Process Complaint Notice

In an April 29, 2020, due process complaint notice, the parents asserted that the district denied the student a free appropriate public education (FAPE) "during his entire educational career, from the 2006-2007 school year to the present" (Parent Ex. A at p. 1). While the parents asserted that the student was denied a FAPE for his entire educational career, they only delineated claims relating to the 2017-18, 2018-19, and 2019-20 school years (*id.* at pp. 2-5).

With respect to those claims that were not tied to a specific school year, the parents asserted that the CSE: improperly classified the student as a student with multiple disabilities and should have instead classified the student as a student with a traumatic brain injury; failed to conduct appropriate, timely, and comprehensive evaluations; failed to identify the student's present levels of performance; failed to develop appropriate annual goals; failed to recommend an appropriate frequency and duration of related services; failed to recommend or provide appropriate prostheses and supports; failed to recommend a proper placement and class size whereby the student could receive one-to-one instruction; failed to mandate a specific methodology for the student's instruction; failed to recommend appropriate supports or services; failed to fully provide those related services that were recommended; failed to provide for a 1:1 school nurse and travel paraprofessional; and failed to consider nonpublic school options (Parent Ex. A at pp. 6-8).

With respect to those claims identified for specific school years, the parents also asserted that with respect to the IEPs developed for the 2017-18 and 2019-20 school years the CSE failed to review any district or independent evaluations; with respect to the IEPs developed for the 2017-18 and 2018-19 school years the CSE failed to recommend a sufficient amount of OT, PT, and speech-language therapy and the district delayed the provision of the outside-of-school OT and speech-language therapy, , the CSE failed to address the student's highly intensive management needs, the student's AAC device was not functioning properly, the CSE failed to recommend assistive technology as a related service, and the CSE did not update the student's annual goals or include annual goals to address activities of daily living (ADLs); and with respect to the 2019-20 school year, the CSE reduced the duration of the recommendation for outside-of-school OT, the CSE failed to recommend appropriate speech-language therapy and PT services, it was unclear if the student's related service began at the start of the school year, the CSE failed to recommend assistive technology as a related services, and the CSE failed to address the student's intensive management needs or recommend a school nurse ((Parent Ex. A at pp. 2-4).

To remedy the asserted district failures, the parents sought, among other things, an order that the district conduct neuropsychological, OT, PT, speech-language, and assistive technology evaluations; that the district fund the costs of the student's tuition and other expenses at iBrain for the 2019-20 school year, including related services, transportation, and a travel paraprofessional

(Parent Ex. A at p. 9). The parents also requested that the IHO find the student eligible for 12 years of extended eligibility to receive special education instruction and related services at iBrain (id.).

In an October 21, 2020 motion, the district requested that the IHO dismiss that portion of the parents' complaint that concerned the 2006-07 through 2017-18 school years as being barred by the statute of limitations (Mot. to Dismiss). The parties convened for a hearing on November 5, 2020 in order to address the district's motion, as well as to address the parents' request for pendency and the possible consolidation of this proceeding with a due process complaint notice regarding the 2020-21 school year (Tr. pp. 1-18). According to a discussion between counsel for the parties during the hearing, the parent's request for pendency at iBrain was addressed by an IHO in the proceeding regarding the 2020-21 school year and the parent was asking for reargument as to that determination (Tr. pp. 6-11). In a decision dated November 6, 2020, the IHO decided that this matter should not be consolidated with the proceeding involving the 2020-21 school year (IHO Order Denying Consolidation). In a November 13, 2020 decision, the IHO determined that the parents did not oppose the district's motion and it was undisputed that the parents did not file their due process complaint notice until more than two years after they knew or should have known of their claims related to the 2017-18 school year (IHO Order on Motion at pp. 1, 3). The IHO further determined that the district presented an undisputed assertion that neither of the exceptions to the statute of limitations applied (id. at pp. 3-4). The IHO therefore dismissed as untimely those claims that covered the "2006-2007 through 2017-2018 school years" (id. at p. 4).

B. Impartial Hearing Officer Decision

The impartial hearing resumed on January 14, 2021 and concluded on March 2, 2021 after three days of hearings (Tr. pp. 25-270).² In an April 11, 2021 decision, the IHO found that: the CSE properly classified the student as a student with multiple disabilities; the district offered the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years; iBrain was not an appropriate unilateral placement for the student for the January to June 2020 time period; and, equitable factors "disfavor neither side" (IHO Decision at pp. 5, 17).

IV. Appeal for State-Level Review

On appeal, the parents assert that the IHO erred by limiting their claims to the 2017-18, 2018-19, and 2019-20 school years due to the statute of limitations. The parents also assert that the IHO erred in failing to find that the district denied the student a FAPE by failing to properly classify the student; by not conducting updated evaluations of the student; by not recommending and implementing appropriate related services and supports; by recommending an inappropriate placement and class size for the student; by failing to recommend and implement appropriate special transportation services, including the provision of a travel paraprofessional; and, by denying the parents a meaningful opportunity to participate in the development of the student's programming.³

² A status conference was held on December 3, 2020, at which time the parties set the January 14, 2021 hearing date for the commencement of the hearing (Tr. pp. 19-24).

³ The parents attach two exhibits to their request for review (SRO Exs. A [partial transcript from a different impartial hearing involving the same student]; B [an IHO decision also from a different impartial hearing involving the same student]). The subject matter of the transcript and IHO decision involve the 2020-21 school year. For purposes of

The parents further assert that the IHO erred in finding that iBrain was not an appropriate unilateral placement for the student for the portion of the 2019-20 school year (January-June 2020) the student attended iBrain. Finally, the parents assert the IHO erred by failing to find that equitable factors favored the parents' request for relief, and moreover, the IHO erred in speculating that the parents may have been "complicit in the attempt to falsely re-classify" the student. For relief, the parents request that the IHO's decision be reversed in its entirety. In their memorandum of law, the parents clarify their requested relief as: a full award of tuition and related services for the 2019-20 school year, including special transportation; three years of compensatory education consisting of tuition, related services, and special transportation at iBrain; an independent neuropsychological evaluation; and extended eligibility until the student turns 25 years of age.

In an answer, the district responds to the parents' allegations, argues that the district offered the student a FAPE for the three school years at issue, requests that the parents' additional evidence be rejected, and requests that the parents' request for review be dismissed. In doing so, the district asserts that the IHO properly found that the 2006-07 through 2017-18 school year claims were barred by the statute of limitations; the student was properly classified as a student with multiple disabilities; the district offered the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years, and iBrain was not an appropriate unilateral placement for the student. The district also asserts that the parents were not aggrieved by the IHO's finding that equitable factors "do not disfavor either party."

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S.

the tuition reimbursement analysis, each school year is treated separately, therefore, any decisions involving school years that occurred after the school years at issue are not relevant (see Mrs. C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000] [examining the prongs of the Burlington/Carter test separately for each school year at issue]). Accordingly, I will not accept these documents related to the 2020-21 school year for the stated purpose of demonstrating the inappropriateness of the district's programming or the appropriateness of iBrain for a prior school year.

at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general

education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁴

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Statute of Limitations

The parents appeal from the IHO's determination that the statute of limitations precludes the parents' claims regarding the 2006-07 through 2017-18 school years. The IDEA provides that a claim accrues on the date that a party knew or should have known of the alleged action that forms the basis of the complaint and requires that, unless a state establishes a different limitations period, the party must request a due process hearing within two years of that date (20 U.S.C. § 1415 [f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.507[a][2], 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114-15 & n.8 [2d Cir. 2008]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]).⁵ Because an IDEA claim accrues when the parent knew or should have known about the claim, "determining whether a particular claim is time-barred is necessarily a fact-specific inquiry" (K.H. v. New York City Dep't of Educ., 2014 WL 3866430, at *16 [E.D.N.Y. Aug. 6, 2014]; see K.C. v. Chappaqua Cent. Sch. Dist., 2018 WL 4757965, at *14 [S.D.N.Y. Sept. 30, 2018] [collecting cases representing different factual scenarios for when a parent may be found to have known or have had reason to know a student was denied a FAPE]). Further, two exceptions to the statute of limitations

⁴ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

⁵ New York State has not explicitly established a different limitations period; rather, it has affirmatively adopted the two-year period found in the IDEA (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]).

may apply to the timelines for requesting impartial hearings. The first exception applies if a parent was prevented from filing a due process complaint notice due to the district withholding information from the parent that the district was required to provide under the IDEA (20 U.S.C. § 1415[f][3][D][ii]; 34 CFR 300.511[f][2]; 8 NYCRR 200.5[j][1][i]). A second exception may apply if a parent was prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice (20 U.S.C. § 1415[f][3][D]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]).

Initially, as noted by the IHO, the parents did not respond to the district's motion to dismiss those claims which accrued before April 29, 2018, nor did they provide an argument during the hearing as to why the district's motion should not be granted (IHO Order on Motion at p. 1). On appeal, the parents assert that the IHO erred because "there was no reason they knew or should have known what constituted an appropriate program for [the student] until he was evaluated at iBRAIN" (Req. for Rev. ¶46).

In this case, the hearing record shows that the parents filed their due process complaint notice on April 29, 2020 (Parent Ex. A). Therefore, without satisfying either exception to the two-year statute of limitations, those claims which accrued before April 29, 2018 are barred by the statute of limitations. The IHO determined that the parents knew or should have known of their claims related to the 2017-18 school year by June 2017 (IHO Order on Motion at p. 3). Upon review of the hearing record, the last IEP developed for the 2017-18 school year was developed in November 2017 (Parent Ex. B). Generally, claims related to the conduct of a CSE meeting or the contents of an IEP accrue at the time of the CSE meeting or at the latest upon the parent's receipt of the IEP (see F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 274 F. Supp. 3d 94, 113-14 [E.D.N.Y. 2017], aff'd 2018 WL 4049074 [2d Cir. Aug. 24, 2018]; Bd. of Educ. of North Rockland Cent. Sch. Dist. v. C.M., 2017 WL 2656253, at *7-*9 [S.D.N.Y. June 20, 2017], aff'd 2018 WL 3650185 [2d Cir. Aug. 1, 2018]). Accordingly, the parents' claims related to the development and recommendations contained in the November 2017 IEP, as well as the parents' claims related to the IEPs developed for the student prior to the November 2017 IEP, are outside the statute of limitations period. Finally, while claims related to inadequate evaluations, an improper classification, or an inappropriate placement may "not accrue until [the parent] gained new information that made [her] aware of inadequacies in the student's prior special education program" (K.H., 2014 WL 3866430, at *16-*20 [E.D.N.Y. Aug. 6, 2014]), the parents have raised this allegation for the first time on appeal, after offering no opposition to the district's motion during the hearing, and despite the parents' due process complaint notice making no mention of new information obtained from iBrain revealing errors in the district's programming (see Tr. pp. 1-18; Parent Ex. A). Additionally, the parents have not asserted, either during the hearing or on appeal, that any exceptions to the statute of limitations should apply. After the district raised the defense of statute of limitations, it was incumbent upon the parent to counter the district's arguments and assert exceptions to the statute of limitations during the hearing (see, e.g., Bd. of Educ. of N. Rockland Cent. School Dist., 744 Fed Appx at 10 n.1).⁶

⁶ To the extent that the parents' assertion on appeal that the parents "showed that they accepted [the district's] representations in good faith and there . . . was no reason they would have known or should have known what constituted an appropriate program" for the student "until he was evaluated at iBrain" (Req. for Rev. ¶ 46; Parent Mem. of Law at p. 23) could be read as an argument for the application of the "specific misrepresentation" exception to the statute of limitations, the assertion is vague and does not provide a basis for overturning the IHO's determination. The "specific misrepresentation exception" applies only "if the parent was prevented from

Accordingly, there is no basis for overturning the IHO's determination that the statute of limitations barred the parents' claims related to the 2017-18 school year, and all prior school years going back to the 2006-07 school year.

Nevertheless, the date of the CSE meeting is not determinative for statute of limitations purposes where the parents challenged implementation of the IEP (K.P. v. Juzwic, 891 F. Supp. 703, 716-17 [D. Conn. 1995]). As the parents have raised claims related to the implementation of the November 2017 IEP, those claims involving the implementation of the November 20, 2017 IEP that accrued on or after April 30, 2018 are not barred by the statute of limitations.

B. Classification

The parents contend that the IHO erred in finding that the district properly determined that the student should be classified as a student with multiple disabilities and assert the student's classification should be as a student with a traumatic brain injury. Generally, with respect to disputes regarding a student's particular disability category or classification, federal and State regulations require districts to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA, as well as to gather information that will enable the student to be "involved in and progress in the general education curriculum" (34 CFR 300.304[b][1]; see 8 NYCRR 200.4[b][1]). Courts have given considerably less weight on identifying the underlying theory or root causes of a student's educational deficits and have instead focused on ensuring the parent's equal participation in the process of identifying the academic skill deficits to be addressed through special education and through the formulation of the student's IEP (see Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [noting the IDEA's strong preference for identifying the student's specific needs and addressing those needs and that a student's "particular disability diagnosis" in an IEP "will, in many cases, be immaterial" because the IEP is tailored to the student's individual needs]; G.W. v. Rye City School Dist., 2013 WL 1286154, * 14 [S.D.N.Y. 2013]; Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331, 1342 [N.D. Ga. 2007]; see also Application of the Dep't of Educ., Appeal No. 12-013; Application of a Student with a Disability, Appeal No. 09-126 [noting that "a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification"]). "Indeed, '[t]he IDEA concerns itself not with labels, but with whether a student is

requesting the hearing due to ... specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint" (20 U.S.C. § 1415[f][3][D][i]). A review of the due process complaint notice indicates that, according to the parents, one of the of the district's many failures included repeatedly misinforming the parents about the types of supports and prostheses the student required to increase the student's strength, control, and flexibility in his joints (Parent Ex. A at p. 7); however, there is no indication that the district represented to the parents that it resolved the issue or that the parents were prevented from requesting the hearing (id.). Moreover, it is not this SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; L.I. v. Hawaii, 2011 WL 6002623, at *9 [D. Haw. Nov. 30, 2011]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]).

receiving a free and appropriate education" Heather S. v. State of Wisconsin, 125 F.3d 1045, 1055 (7th Cir.1997).

CSEs are not supposed to rely on the disability category to determine the needs, goals, accommodations, and special education services in a student's IEP. That is the purpose of the evaluation and annual review process; an evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (see 34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). Once a student has been found eligible for special education, the present levels of performance sections of the IEP for each student is where the focus should be placed, not the label that is used when a student meets the criteria for one or more of the disability categories.

"Traumatic brain injury" is defined as "an acquired injury to the brain caused by an external physical force or by certain medical conditions such as stroke, encephalitis, aneurysm, anoxia or brain tumors with resulting impairments that adversely affect educational performance. The term includes open or closed head injuries or brain injuries from certain medical conditions resulting in mild, moderate or severe impairments in one or more areas, including cognition, language, memory, attention, reasoning, abstract thinking, judgement, problem solving, sensory, perceptual and motor abilities, psychosocial behavior, physical functions, information processing, and speech. The term does not include injuries that are congenital or caused by birth trauma."

(see 8 NYCRR 200.1[zz][12]).

"Multiple disabilities means concomitant impairments (such as intellectual disability-blindness, intellectual disability-orthopedic impairment, etc.), the combination of which cause such severe educational needs that they cannot be accommodated in a special education program solely for one of the impairments. The term does not include deaf-blindness."

(see 8 NYCRR 200.1[zz][8]).

At this juncture, when the student's eligibility for special education is not in dispute, the significance of the disability category label is more relevant to the LEA and State reporting requirements than it is to determine an appropriate IEP for the individual student.⁷

⁷ The disability category for each eligible student with a disability is necessary as part of the data collection requirements imposed by Congress and the United States Department of Education upon the State, which require annual reports of [t]he number and percentage of children with disabilities, by race, ethnicity, limited English proficiency status, gender, and disability category, who fall in over a dozen other subcategories (20 U.S.C. § 1418[a]; 34 CFR 300.641). Although it does not bind the CSE in its responsibility to provide individualized services in accordance with the student's unique needs, for reporting requirement purposes [i]f a child with a disability has more than one disability, the State Education Agency (SEA) must report that child in accordance with the following procedure:

As discussed in more detail below, the student demonstrates complex educational needs related to academics, speech-language development, functional communication, fine and gross motor development, functional vision, feeding, and ADLs, as well as challenges related to attention and distractibility (see Parent Exs. C; E; J; M; N; Dist. Exs. 3; 7; 12; 19). The student has been diagnosed as having, among other things, spastic quadriplegia cerebral palsy, microcephaly, dysgenesis of the corpus collosum, multifocal partial seizures that have resulted in severe cognitive impairments, a cortical visual impairment and orthopedic problems (Tr. p. 198; Dist. Exs. 3 at p. 4; 7 at p. 4; 12 at p. 4; 19 at p. 4; Parent Exs. C at p. 1; M at p. 3). In addition, the student is dependent on adults for all ADLs, is non-verbal, and non-ambulatory (Parent Exs. C at p. 2; N at p. 1; Dist. Exs. 3 at p. 2; 7 at p. 2; 19 at p. 3). Thus, the hearing record supports a finding that the student's complex needs constitute "concomitant impairments" the combination of which cause such severe educational needs that they cannot be accommodated in a special education program solely for one of the impairments, and as such the student meets the criteria for classification as a student with multiple disabilities (Dist. Ex. 12 at pp. 1-9; see 8 NYCRR 200.1[zz][8]). The hearing record also demonstrates that the CSE reviewed sufficient evaluative information to determine the student's needs and developed a program based on the student's needs rather than solely on the student's disability classification. Therefore, the student's classification as a student with multiple disabilities is appropriate, and as such the CSE's classification of the student neither denied the student of FAPE nor contributed to the denial of FAPE in any way.

C. 2017-18 School Year

1. Scope of Review

As noted above, with respect to the 2017-18 school year, only those claims which accrued on or after April 30, 2018 are a subject of this proceeding. The IEP in effect during the time period the parents assert a failure to implement was the November 2017 IEP—(Parent Ex. B).

Turning to the parents' specific allegations, the parents assert that the district failed to provide all of the student's home-based PT services. However, review of the November 2017 IEP shows

(1) If a child has only two disabilities and those disabilities are deafness and blindness, and the child is not reported as having a developmental delay, that child must be reported under the category "deaf-blindness."

(2) A child who has more than one disability and is not reported as having deaf-blindness or as having a developmental delay must be reported under the category "multiple disabilities"

(34 CFR § 300.641[d]). The Local Education Agency (LEA) must, in turn, annually submit this information to the SEA through its SEDCAR system (see, e.g., Verification Reports: School Age Students by Disability and Race/Ethnicity" available at <http://www.p12.nysed.gov/sedcar/forms/vr/1819/pdf/vr3.pdf>; see also Special Education Data Collection, Analysis & Reporting available at <http://www.p12.nysed.gov/sedcar/data.htm>). According to the Official Analysis of Comments to the revised IDEA regulations the United States Department of Education indicated that the multiple disability category "helps ensure that children with more than one disability are not counted more than once for the annual report of children served because State's do not have to decide among two or more disability categories in which to count a child with multiple disabilities" (Multiple Disabilities, 71 Fed. Reg. 46550 [August 14, 2006]).

that the CSE did not recommend home-based PT services (Parent Ex. B at pp. 13, 17). As such the parents' claim that the district did not implement home-based PT services cannot be sustained.

To the extent that the parents assert the IHO erred in overlooking the parents' testimony that the district failed to provide consistent transportation services (see Parent Ex. N at p. 3); the allegations contained in the due process complaint notice do not include a claim that the district failed to implement recommended special transportation (see Parent Ex. A). The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Accordingly, this claim will not be reviewed on appeal.

Additionally, although the due process complaint notice included an allegation that the student missed home-based speech-language therapy sessions due to a delayed start in services (Parent Ex. A at p. 3), the parents have not raised this claim on appeal, and therefore it is deemed abandoned (8 NYCRR 279.8[c][4]).

The implementation claims properly raised on appeal include allegations that the student did not timely receive the proper mount for his eye-gaze equipment and that the district failed to provide OT to the student for part of the school year.

2. Implementation Issues

The parents assert that the district failed to properly implement the student's assistive technology services and home-based OT services during the 2017-18 school year. The IDEA requires that, once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17 [d]; see 20 U.S.C. § 1414 [d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if there was more than a de minimis failure to implement all elements of the IEP, and instead, the school district failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243, 1251 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial or "material" (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 75-76 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP,

and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

a. Assistive Technology

The parents asserted that the district failed to timely provide the student with the appropriate wheelchair mount for his communication device. The hearing record indicates that the student received the appropriate wheelchair armature mount in April 2018, approximately four months after the student received the communication device (Tr. pp. 250-52; Parent N at p. 2). The student's father's testimony that it was "really April 2018" when the armature mount was available, calls into question whether this claim did, in fact, accrue on or after April 30, 2018. However, assuming for sake of argument that the district provided the student with the armature mount on April 30, 2018, the first day that implementation issues could have accrued, a one day delay in implementation is not sufficient to find a denial of FAPE (see A.P., 370 Fed. App'x at 205; Catalan, 478 F. Supp. 2d at 75-76).

b. Home-based Occupational Therapy

The parents asserted that the district failed to provide all of the mandated home-based OT services because the service was delayed several months (Parent Ex. A at p. 3). Although this claim is vague enough to potentially preclude it due to the statute of limitations, **if**, for example, the "several months" were at the start of the 2017-18 school year; but it is also vague enough as to include it, if for example, the home-based OT was not started for "several months" after April 30, 2018. However, as the district—the party with the burden for this issue—did not provide any proof of when the student started receiving the home-based OT services, it can only be assumed that the service was not provided to the student during the relevant portion of the 2017-18 school year. Despite the vagueness of the claim, I will allow the claim to stand from April 30, 2018 though the end of the 2017-18 school year.

As noted above, the November 2017 IEP recommended two 60-minute sessions per week of individual OT outside of school (Parent Ex. B at p. 11). The IHO should have determined whether the district established that it provided the home-based OT services in accordance with the written terms of the December 2017 IEP and, if not, whether such a deviation from the IEP was material. However, the IHO erred by faulting the parent for a lack of proof of non-delivery of the services on this matter and then engaging in circular reasoning to presume that the student received an equal number of hours of OT services in school and that it had no effect upon the student's programming (IHO Decision at pp. 7-8). But these factual determinations that could not supported by evidence in the hearing record as none at all was offered on this particular issue. The district was on notice of the parents' claim that the district had failed to deliver OT services to the student during the 2017-18 school year at it was raised in the due process complaint notice (Parent Ex. A at p. 3). As the district did not meet its burden of demonstrating that the student was provided with OT services from April 30, 2018 through the end of the 2017-18 school year, the hearing record requires a finding that the district deviated from the student's November 2017 IEP by failing to provide home-based OT services and the parent is entitled to compensatory relief for those missed services because it was a material deviation. Accordingly, the student will be awarded 16 hours of home-based OT services as compensatory education for the services missed during the 2017-18 school year.

D. 2018-19 and 2019-20 School Years

1. Evaluative Information

The parents contend that the IHO erred in failing to find that the district did not appropriately evaluate the student. Review of the hearing record shows that the district evaluated the student annually.

According to the December 2018 IEP, the CSE reviewed the following evaluative information: the Student Annual Needs Determination Inventory (SANDI), the Formative Assessment of Student Tasks (FAST), the School Function Assessment - Part I Participation and activities for cognitive/behavioral tasks, the Gross Motor Function Classification System (GMFCS), the Citywide Speech Services Communication Profile, the Student, Parent and Teacher versions of the Level 1 Vocational Assessment, and teacher and staff observations (Dist. Ex. 12 at pp. 1-2, 5). The March 2019 prior written notice indicated that the December 2018 CSE reviewed a December 2018 teacher report (Dist. Ex. 13 at p. 2).

According to the December 2018 IEP, the SANDI and the FAST were administered on October 22, 2018 (Dist. Ex. 12 at p. 1). The student's 2017-18 special education teacher described the SANDI assessment as a list of skills that build on each other, moving from basic skills to higher-level skills (Tr. p. 64). She further explained that a scale of zero to four was used when assessing a student's skills, with zero meaning not yet approaching the skills, one - introducing the skill, two - needs much support, three - needs less support (less than two prompts) and four - can do the skill independently (Tr. p. 64). The teacher opined that "we use them because they're the most reliable" (Tr. p. 70). The student's special education teacher from the 2019-20 school year testified that the SANDI is a standardized assessment used in the fall and the spring to assess needs and help determine the IEP goals and potential goals moving forward (Tr. p. 176). He further explained that he focused on the reading, writing, math, and communication development subtests (Tr. p. 176). Additionally, the 2019-20 teacher testified that the score was primarily based off teacher observation and was used along with a vocational assessment for "grading goals" (Tr. pp. 178-79).

The student's 2017-18 special education teacher testified that the FAST was connected to the SANDI because both assessed skills in reading, writing, math, and communication (Tr. p. 50). She further explained that the SANDI and FAST were alternate assessments for students who were not approaching grade level standards and broke down the standards into core skills that students could work toward (Tr. p. 50).

The occupational therapist, who began working with the student in 2014, testified that she had completed the cognitive/behavioral section of the School Function Assessment for the 2017-18, 2018-19, and 2019-20 school years (Tr. pp. 85, 127-28). She explained that it was a school-based assessment of the interaction between students and their environment (Tr. p. 127). Additionally, the OT explained that she picked the area she felt would benefit a student the most "within their context of what their functioning level [wa]s," and indicated that she chose cognitive/behavioral for the student because that was the area she felt she would be working on the most with him due to his communication device (Tr. pp. 127-28). Furthermore, the occupational therapist stated that the cognitive/behavioral section was "one I felt that I could look to see how I could best help [the student] within his school environment" (Tr. pp. 128-29). The occupational therapist listed the

categories included in the cognitive/behavioral section of the School Function Assessment including functional communication, memory and understanding, following social conventions (i.e., directives and school rules), task behaviors like completions and maintaining attention, behavior regulation, and personal care awareness and safety (Tr. p. 129). She further explained the rating key which included extensive, moderate, minimal, or no assistance (Tr. pp. 129-30). Finally, the occupational therapist testified that the physical therapist completed the School Function Assessment participation section (Tr. p. 129).

With regard to gross motor function, the December 2018 IEP indicated that the GMFCS was administered to the student on November 14, 2018 (Dist. Ex. 12 at p. 5). The reported results indicated that the student was at Level V in his physical function (*id.*). The student's occupational therapist testified that the GMFCS was a PT assessment, and she explained that level five meant the student was limited in his ability to maintain anti-gravity head and trunk postures and control arm and leg movements and that his self-mobility was severely limited (Tr. pp. 85, 146-47).

The December 2018 IEP contained the results of the Citywide Speech Services Communication Profile, observations and interview, which indicated that

[the student's] hearing and vision (with prescription eyeglasses) appear to be within normal limits. He is easily distracted and enjoys when peers or adults make noises or unpredictable outburst (during activities) because he laughs and is part of the conversation as everyone notices his interaction. [The student] attends and acts on objects with adult or peer assistance he has eye contact or face regard, shared focus (looks at objects other persons has) and can take turns and wait his turn. [The student] shows interest in music, books and class discussions, he rejects/protests by turning away, facial grimaces or crying. [The student] is able to anticipate the next step in a familiar routines and responds appropriately to objects and verbal prompts inconsistently. During mealtime [the student] is on a chopped diet and is dependent on adult participation during eating. [The student] has shown improvement in taking chopped food, crushed banana, pudding or applesauce off his spoon. He also take sips of room temperature water after snack and lunch

(Dist. Ex. 12 at p. 3).

The November 2019 IEP indicated that the CSE considered the evaluation results from the administration of several evaluations including: the October 2018 Level One Vocational Assessment (student, teacher, and parent versions), a fall 2019 SANDI and FAST, a November 2019 School Function Assessment, a November 2019 GMFCS, and the results of the Citywide Speech Communication Profile and observations (Parent Ex. D at pp. 1-2). The December 2019 prior written notice indicated that the November 2019 CSE reviewed a November 2019 teacher report (Dist. Ex. 20 at p. 2).

Based on the information discussed above, the district assessed the student across several domains including those related to academics, communication, cognition, behavior, gross motor, fine motor, attention, and language.

2. Goals

The parents argue that the annual goals contained in the November 2019 IEP were less challenging than the student's goals on the previous IEP and therefore inappropriate.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Additionally, the carryover of annual goals from a student's IEP in the prior school year to the next school year's IEP has been found to be appropriate "[w]here a student's needs and objectives remain substantially the same, '[i]t is especially sensible that [an IEP] would reflect continuity with [a student's] needs and objectives as of [previous years,]'" (*P.C. v. Rye City Sch. Dist.*, 232 F. Supp. 3d 394, 413-15 [S.D.N.Y. 2017] quoting *L.B. v. New York City Dep't of Educ.*, 2016 WL 5404654, at *11 [S.D.N.Y. Sept. 27, 2016]).

The December 2018 CSE developed approximately seven annual goals designed to improve the student's ability to: show comprehension of the subject matter after being read to for one minute by answering "yes" to two questions using his alternative augmentative communication (AAC) device with picture symbols when given two verbal prompts; sustain visual attention to a picture symbol in the upper left quadrant of midline (such as "yes" on his AAC device) two times and the lower right quadrant of midline (such as "no" on his AAC device) two times for at least three seconds to indicate his yes/no response to answer classroom questions such as identifying personal belongings; sustain his head in midline for three consecutive seconds during transfers between sitting and standing while accessing his classroom materials, AAC device or picture symbols; use his alternative augmentative system to communicate throughout activities by remaining focused to enable activation; indicate the first letter to spell his name when given two picture symbols to choose from when given two verbal prompts; match two picture symbols accurately using his AAC device when given two verbal prompts; and maintain eye contact with a peer or adult during an interactive activity for five seconds (Dist. Ex. 12 at pp. 8-15).

The November 2019 IEP contained approximately seven annual goals designed to improve the student's ability: to follow a person for five seconds; to use his PMC to select the correct writing utensil that has been requested;⁸ to correctly select the date using his PMC; answer yes or no questions throughout an instructional period; sustain visual attention to a picture symbol for at least three seconds to accurately identify the picture symbol of the sound heard in the classroom environment out of a choice of two picture symbols, after being presented with an auditory example of an environmental sound (i.e., knocking on a door, paper shredding, water pouring) for 30 seconds; place weight on his feet during transfers between sitting and standing in order to access his AAC

⁸ The student's 2019-20 special education teacher, who developed the academic goals for the November 2019 IEP, explained that PMC stands for "preferred mode of communication" (Tr. pp. 108, 182).

device, picture symbols, or class material given maximum assistance; and respond to questions directed to him via alternative augmented communication (Parent Ex. D at pp. 5-7).

The December 2018 CSE developed an annual goal in reading which was designed to improve the student's listening comprehension skills by reading to him and then asking him to respond to "yes" questions via his AAC device (Dist. Ex. 12 at pp. 8-9). In contrast, the November 2019 CSE developed a reading goal to improve the prereading skill of following a familiar person (Parent Ex. D at p. 5). Additionally, the December 2018 CSE developed a writing goal that targeted the student's ability to identify the first letter in his name given a choice of two picture symbols (Dist. Ex. 12 at p. 13). However, the November 2019 CSE developed an annual goal to address the prewriting skill of using his PMC to select the correct writing utensil that was requested (Parent Ex. D at p. 5). Comparison of these annual goals in reading and writing showed that the November 2019 CSE developed annual goals to address skills at a much lower pre-readiness level than those developed by the December 2018 CSE.

Additionally, the December 2018 CSE developed an annual goal in math which was to improve the student's ability to match two picture symbols; however, the November 2019 CSE developed an annual goal to improve the student's ability to use his PMC to select the date (compare Dist. Ex. 12 at pp. 13-14 with Parent Ex. D at p. 5). The math goal developed by the November 2019 CSE appears to be quite ambitious given that the student's progress on both the first and second progress reports contained in the December 2018 IEP indicated that the student had made little progress matching two picture symbols when given up to five verbal prompts (Dist. Ex. 12 at p. 14).

Further review of the December 2018 IEP showed that the progress reports indicated the student had made progress and was anticipated to meet the following annual goals: sustaining his head in midline for three consecutive seconds during transfers, between sitting and standing, and while accessing classroom materials, and maintaining eye contact with a peer or adult during an interactive activity for five seconds (Dist. Ex. 12 at pp. 11, 15). The progress reports contained in the December 2018 IEP for the following annual goals indicated "little progress made: anticipate meeting goal": showing comprehension of the subject matter after being read to for one minute by answering yes to two questions using his AAC device with picture symbols; using his alternative augmentative system to communicate throughout activities by remaining focused to enable activation; and matching two picture symbols accurately using his AAC device when given two verbal prompts (id. at pp. 9, 12-14).

The IEP progress report for the annual goal developed to improve the student's ability to sustain attention to a picture symbol in the upper left quadrant of midline and the lower right quadrant of midline for at least three seconds to indicate his yes/no response to answer classroom questions such as identifying his personal belongings (i.e., is this your jacket?) initially noted that the student had made progress and anticipated meeting the goal; however, the second progress report indicated "little progress made: do not anticipate meeting goal" because more time was needed (Dist. Ex. 12 at pp. 9-10). The occupational therapist testified that she changed this goal in the November 2019 IEP because she felt responding to "yes" and "no" questions was not sufficiently motivating for the student to sustain his visual attention and his progress with this goal had been inconsistent (Tr. pp. 141-42).

In this case, the evidence shows that annual goals targeted one skill in reading and one skill in writing that were somewhat below the student's instructional level, and one skill in math that was likely too ambitious because while he may achieve it at some point in the future, I'm not convinced that he would be likely to master the skill in one year. However, the goals were developed by the student's then current teacher and providers and the evidence indicates that the student's responsiveness was inconsistent and that changes in the goals were needed. Aside from the three goals referenced above, review of the remaining annual goals and short-term objectives contained in the November 2019 IEP, which addressed OT, PT, speech-language and communication, indicated that the annual goals developed by the CSE were appropriately aligned with the student's skill levels at the time the IEP was developed.

3. Related Services

a. Home-based OT and PT

According to the parents, the IHO erred because he should have concluded that the district failed to provide the student with home-based OT and PT and the IHO should have inferred that prior IEPs calling for home-based services were an acknowledgement by the district that the student continued to require those services in order to receive a FAPE (see Req. for Rev. ¶ 25). The argument is without merit.⁹ It is well settled that IEPs are evaluated separately for appropriateness based on each school year (see Mrs. C., 226 F.3d at 67 [examining the prongs of the Burlington/Carter test separately for each school year at issue]; Omidian v. Board of Educ., 2009 WL 904077 at *21-*26 [N.D.N.Y. Mar. 31 2009] [analyzing each year of a multi-year tuition reimbursement claim separately]). Therefore, to the extent that the parents contend that the proof that the student required home-based related services was the student's receipt of the services in prior years, it is unconvincing.¹⁰

The IHO was also correct regarding the parents' argument that the primary motivation of the district for removing the home-based mandates for OT and PT was a failure to obtain therapists for the mandated services was not supported by the evidence in the hearing record and was too speculative.¹¹ It appears that the parents are asserting that the district has committed systemic

⁹ To the extent the parents include "each and every year" prior to the 2018-19 school year, as discussed above, the allegations related to those years are beyond the statute of limitations.

¹⁰ Just as a prior IEP's provisions do not, in and of themselves, prove that changing those provisions the next year is proof of a FAPE or lack thereof, it is also inappropriate to use a subsequent IEP or the results of a subsequent impartial hearing to prove that a student was either provided with or denied a FAPE during a prior school year. To the extent that the parents submitted subsequently developed IEPs or impartial hearing officer's decisions issued after the school years at issue in this proceeding, the parents' argument is misguided as the CSE's determinations must be judged based on the information that was available to them (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]; F.O. v New York City Dep't of Educ., 976 F. Supp. 2d 499, 513 [S.D.N.Y. 2013] [refusing to consider a subsequent school year IEP as additional evidence because it was not in existence at the time the IEP in question was developed]).

¹¹ The parents assert that their statements at the impartial hearing to this extent were uncontroverted and should have been given due weight. The IHO decision shows that the IHO found that the parents provided no substantive

violations going back to "each and every school year" prior to the 2018-19 school year; however, an SRO does not have the authority to correct systemic violations where the alleged deficiencies were in the administrative scheme, and therefore, those claims are not properly the subject of this proceeding (J.S. v. Attica Cent. Schools, 386 F.3d 107, 113 [2d Cir. 2004]; Heldman v. Sobol, 962 F.2d, 148 [2d Cir. 1992]).

To the extent that the parents vaguely assert that for the 2018-19 and 2019-20 school years the district denied the student a FAPE by providing only three, 30-minute sessions per week of "related services" (Req. for Rev. ¶31), the parents did not even specify which related services in particular were lacking and a review of the hearing record shows that for each school year, the CSE recommended five sessions each week of OT and PT, and six sessions per week of speech-language therapy (Parent Ex. B at pp. 10-11; Dist. Exs. 12 at pp. 16-17; 19 at pp. 14). Further, as noted above, the parents' comparison of the programs at issue in this proceeding to an IEP developed afterwards is not permitted (F.O., 976 F. Supp. 2d at 513 [S.D.N.Y. 2013]). Thus, the hearing record does not support the parents' dubious claim that the district denied the student a FAPE by providing three, 30-minute sessions per week of related services.

b. Vision Education Services

The parents assert on appeal that the CSE failed to recommend vision education services. Although the parents' noted that the student has a cortical vision impairment, the due process complaint notice did not include an allegation that the district failed to provide vision education services (see Parent Ex. A). The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or file an amended due process complaint notice, and were the first to raise the issue during cross-examination (Tr. pp. 75, 138-39, 193), I decline to review this issue for the first time on appeal (M.H., 685 F.3d at 250-51).

proof that the CSE removed related services from a student's program because it lacked the providers. To the contrary, the student's OT testified that because the parent had mentioned that the student was missing some of the home-based OT during the "2018 year," the therapist changed the student's mandate to all in-school based OT (Tr. pp. 99-100). As the hearing record provides no other IEPs for the 2018-19 school year that provided for home-based OT, it is not clear if the "2018 year" was that January-June portion of the 2017-18 school year, or the July-December portion of the 2018-19 school year (id.). Moreover the parent specifically references the failure of the district to deliver services under an "ISP"; however, this was a different plan to be implemented by another private organization, likely home and community based services pursuant to Medicaid waiver, that was created by the Office for People With Developmental Disabilities (Parent Exs. A at p. 3; C; N at p. 2). In any event, planning for the delivery of home-based services a CSE knows are not available and believes it can replicate in the school environment would not be of benefit to the student.

4. Special Factors - Assistive Technology

Turning to the parents' arguments about assistive technology devices and/or services, federal and State regulations describe an assistive technology device as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability" and assistive technology service as "any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device" (34 CFR 300.5, 300.6; 8 NYCRR 200.1[e]; [f]). Furthermore, State regulations consider assistive technology services to be a related service defined as a "developmental, corrective, and other supportive services as are required to assist a student with a disability" (8 NYCRR 200.1[qq]).¹²

The parents contend that the student's teacher and therapists could not train the student properly in the use of the assistive technology device and that they were unable to incorporate the device into the curriculum.

The December 2018 CSE recommended the student receive a dynamic display speech generating device to be integrated into the existing school program as well as to be used at home (Dist. Ex. 12 at p. 17). Additionally, the IEP recommended that the student have access to programmatic, high and low tech alternative augmentative device systems throughout his class routines and therapies for continuity of training with effective communication skills (id. at p. 6).

Review of the hearing record indicates that the student received a Tobii Dynavox with eye gaze on or around December 2017 (Tr. p. 250). According to the student's 2017-18 special education teacher, the student had been using a Mac computer with a mounted camera that tracked the student's head movements and eye gaze (Tr. p. 71). After an assistive technology evaluation, the student received a newer tablet device that had a camera and could be mounted to the student's wheelchair (id. at pp. 71, 74). The 2017-18 special education teacher testified that the student used the device in the classroom, and described that the staff would put vocabulary words, common phrases and greetings into the device so he could use those in the classroom during instruction (Tr. pp. 71-72). She further testified that she focused on communication and activating the device, answering questions after listening to text and participating in activities (Tr. p. 59). Additionally, the 2017-18 special education teacher explained that the student also used BIGmack switches in the classroom which were programmed with one word, phrases or as sequence buttons for voice output (Tr. p. 72).

¹² Examples of the term assistive technology service include:

- (1) the evaluation of the needs of a student with a disability, including a functional evaluation of the student in the student's customary environment;
- (2) purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by students with disabilities;
- (3) selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;
- (4) coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;
- (5) training or technical assistance for a student with a disability or, if appropriate, that student's family; and
- (6) training or other technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of that student

(8 NYCRR 200.1[f]).

The 2017-18 special education teacher indicated that the student received training using the assistive technology device from his speech therapist and the district's "tech team" (Tr. p. 75). She further explained that the "tech team" visited the school multiple times to train the classroom staff and to speak with the speech therapist (Tr. p. 76).

As noted above, the November 2019 CSE recommended the student received a dynamic display SGD for daily use in school and at home and indicated that the device was to be integrated into the existing program (Parent Ex. D at p. 8).

The student's 2019-20 special education teacher testified that the student's speech-language therapist "went over how the device works and how to operate the device" with him, and indicated that there was frequent communication between himself and the student's therapists (Tr. pp. 191-92). The student's 2019-20 special education teacher testified that the student exhibited inconsistent progress and interest in using the assistive technology device, noting that he would often look away or become uninterested and stop participating (Tr. p. 183). He described that when the device was removed, the student would smile again and become much more willing to engage (Tr. pp. 183-84). The 2019-20 special education teacher testified that when the student was unwilling to use the device he would go back to using manual picture cards, noting that those were what he primarily used because the student refused to use the device most days when he was in the classroom (Tr. pp. 194-95). The teacher opined that he "never, typically, had any issues getting [the student] engaged when it came to picture cards" (Tr. p. 195).

According to the student's occupational therapist, the "tech team" taught the student's team how to use the device and how to help the student engage with the device (Tr. p. 137). She explained that the student was still learning how to maintain visual attention and that it was a team effort to help him learn the device (*id.*). The occupational therapist indicated that even with the engagement the student exhibited during group sessions, his use of the device was inconsistent (Tr. pp. 140-41). However, she also testified that she knew the student was able to use the device "because he was able to activate it at times" (Tr. p. 105). The occupational therapist further explained that the student was not consistent enough to achieve the OT goal contained in the December 2018 IEP; therefore, she revised the annual goal in the November 2019 IEP to make sustaining visual attention more motivating to the student (Tr. p. 141).

5. 12:1+(3:1) Special Class Placement

The parents argue that the IHO erred in finding that the 12:1+(3:1) special class was appropriate to meet the student's needs. The parents contend that due to the student's distractibility and need for less visual stimuli, the 12:1+(3:1) was too distracting and the student would not be able to maintain focus and make progress. Review of the hearing record shows that the student was distractible; however, it also shows that the student demonstrated increased engagement and attention, and he participated more when in a group.

According to the December 2018 IEP, the student was easily distracted but he enjoyed when peers or adults made noises or unpredictable outbursts during activities because he laughed and was part of the conversation (Dist. Ex. 12 at p. 3). Additionally, the IEP noted that the student showed interest in music, books, and class discussions (*id.*). The December 2018 IEP indicated that the student was well adjusted to the 12:1+(3:1) classroom environment and was "socially adept as he

navigate[d] different environments within the school and interact[ed] with different adults and his peers" (id. at p. 4). Furthermore, the IEP noted that the student liked to eat food with his peers, would physically move his body when he heard percussive music he liked, and that he was eager to participate in classroom activities such as visually choosing how objects were organized in the classroom (id.).

According to the November 2019 IEP, the student was "capable of receptively participating in class discussions and w[ould] look at various classmates/staff within his environment turning his head or moving his eyes from one speaker to the next " (Parent Ex. D at p. 1). The IEP noted that the student enjoyed games played within the class and enjoyed being with his peers during those sessions (id.). The November 2019 IEP indicated that in speech-language therapy, the student was a social young man who enjoyed being spoken to and interacting with classroom activities, specifically noting that he would attend to voices around him by smiling, vocalizing, and laughing depending on the nature of the conversation around him (id. at p. 2). With regard to social development, the November 2019 IEP indicated that, based on teacher observation, the student showed engagement in both lessons and social interactions throughout the day, and noted that he enjoyed being able to socialize with teachers, paraprofessionals and service providers (id. at p. 3). The teacher noted that the student enjoyed being able to give his input on how the classroom was set up and participating in routines (id.).

The student's 2019-20 special education teacher testified that from September 2019 to December 2019, he saw an increase in the student's participation and engagement in class, and noted that he worked very hard to participate in lessons and tried to answer "as many questions as he c[ould]" (Tr. p. 182). The teacher explained that throughout those four months, the student "strived to answer as many questions as he could and really be as active as he could in the classroom" and opined that this showed that the student wanted to be an active participant within the community (id.). Additionally, the teacher testified that the student benefitted from the peer and adult interactions he had at school in the 12:1+(3:1) and that home or hospital care would have been too restrictive and an 8:1+1 class would not have provided the student with enough support to reach his academic goals (Tr. pp. 182-83).

The student's occupational therapist, who began working with him in 2014, testified that she had noticed that the student displayed more attention during group activities; therefore, she wanted to change the OT mandate in the December 2018 IEP to include two sessions in a small group of 2:1 to be provided in the school setting (Tr. pp. 118-19; Dist. Ex. 12 at p. 18).¹³ She described that when she pushed into the student's class, he was "really much more engaged," and that he appeared to really enjoy the teacher's lessons that included music and "[h]e would laugh quite often" (Tr. p. 131). Additionally, she explained that the areas where she observed improvement were in positive social interactions, he was looking towards peers, showing more attention by showing emotions, laughing, sitting upright, and not looking down in a group type of engagement (Tr. pp. 132-33). She further testified that throughout the year, the student was more attentive to tasks, to the other peer in the group sessions, and he was more engaged (Tr. pp. 119-20). The occupational therapist opined

¹³ The November 2017 IEP mandate for OT was three sessions weekly for 30 minutes individually within the school setting, and two sessions for 60 minutes individually at home (Parent Ex. B at pp. 10-11). The mandate in the December 2018 IEP was three sessions for 30 minutes individually and two sessions for 30 minutes in a group of two, all provided within the school setting (Dist. Ex 12 at p. 16).

that "being with peers was really a strength" and she explained that in her collaboration with the student's team, they had noticed "that [the student] really thrive[d] in...group type settings" (Tr. pp. 120-21). The occupational therapist described that during the small group sessions, the student would eye gaze (appear to look) at the other student when it was their turn, specifically noting the student's increased engagement and visual attention to the other student and the activity (Tr. p. 139). The occupational therapist testified that because the team had noticed how well the student was doing in group settings she replaced an individual session with a group session in the November 2019 IEP changing the OT mandate to three group sessions and two individual sessions (Tr. p. 121; Parent Ex. D at p. 7). The occupational therapist testified that the mandates were decided with the student's parents and as a team "as to what we felt would be most appropriate" (Tr. pp. 142-43).

The student's 2017-18 special education teacher testified that by the end of the 2017-18 school year, the student had improved in his participation in routine activities, explaining that he had learned the routines and was participating in them with more independence than at the beginning of the year (Tr. pp. 79-80). She explained that progress for the student meant building engagement and attention and increasing the duration and the quality of engagement in activities (Tr. p. 80).

Having reviewed all of the parents' arguments regarding the programs developed for the student in his IEPs during the 2018-19 and 2019-20 school years, the evidence is sufficient to find that the district offered the student a FAPE. The foregoing evidence suggests that there is likely some misalignment in three annual goals when compared between the December 2018 IEP and the November 2019 IEP, and those particular goals could have been more carefully associated with this student's skill levels at the time they were drafted (or further evidence should have been offered to explain the discrepancies if the student's teacher believed they were nevertheless appropriate). However, taking into account the severity of the student's deficits and his need for more engagement with his teachers, the annual goals overall were not so insufficiently challenging as to deprive the student of a FAPE, especially with one goal being overly ambitious to a small degree. The evidence further reveals no particular defects as alleged by the parent with the student's related services, and that the district provided the student with the assistive technology devices, showed the student how to use them, and that his desire to use them was inconsistent. However, the IEP otherwise recognized that the student could express preferences in his mode of communication and the mere fact that a student was resistant at times to using an assistive technology device does not mean that the district has denied the student a FAPE (C.B. v. Pittsford Cent. Sch. Dist., 2010 WL 1533392, at *10 [W.D.N.Y. Apr. 15, 2010]). Additionally, the hearing record indicates that the district's recommendation for placement of the student in a 12:1+(3:1) special class was reasonable as it would have provided the student with support as well as the opportunity for social interactions. The parents' allegations in this matter are insufficient to overcome the IHO's determination that the student's December 2018 and November 2019 IEPs were reasonably calculated to enable the student to receive educational benefits in light of his circumstances.¹⁴ Because the district offered the student a FAPE for the later periods at issue in this proceeding and the compensatory education as

¹⁴ The parents' request for review includes a heading indicating that the district denied the parents "meaningful participation in the educational process"; however, the allegations in this section are a rehashing of the parents' allegations regarding the sufficiency of the evaluative information and the parents' concerns regarding assistive technology services and training (Req. for Rev. ¶¶39-43). As I have determined that the district had sufficient evaluative information regarding the student and that the recommendations for assistive technology were appropriate, I will not further address these allegations.

described above is an appropriate equitable remedy for the missed home-based OT services during the 2017-18 school year, it would not be appropriate to award reimbursement for the unilateral placement of the student at iBrain.

E. Unilateral Placement

Although I have determined that the parents do not prevail in their reimbursement claims for iBrain in this proceeding I will, as a matter within my discretion, provide alternative findings regarding the second and third Burlington/Carter criteria. The IHO determined that iBrain was predominately inappropriate for the student due to his determination that the student did not have a traumatic brain injury and the evidence that iBrain was a school designed for students with traumatic brain injuries (IHO Decision at pp. 13-15). Additionally, the IHO found that iBrain was inappropriate in part due to the limited academic instruction the school provided to the student and because it did not allow the student access to nondisabled peers (id. at pp. 15-16).

The parents assert the IHO used an improper legal standard when determining that iBrain was not an appropriate unilateral placement for the January-June portion of the student's 2019-20 school year. I agree with the parents that the IHO utilized inappropriate standards in finding iBrain inappropriate.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

As noted previously regarding the parties' classification dispute, with respect to a student's particular classification, it has been held that "particular disability diagnosis" in an IEP "will, in many cases, be immaterial" because the IEP is tailored to the student's individual needs (see Fort Osage R-1 Sch. Dist., 641 F.3d at 1004). iBrain, a parentally-selected nonpublic unilateral placement, was not required to create an IEP or identify the student's category of eligibility therein merely to comply with procedural requirements of the IDEA. Once again how a program is labeled is not important, whether the label is multiple disabilities or traumatic brain injury. Instead, the same substantive considerations and criteria that apply in determining whether the district's placement is appropriate should be considered in determining the appropriateness of the parents' placement (Gagliardo, 489 F.3d at 112), that is whether the special education services provided by iBrain in this case were appropriate to address the student's needs, whether or not commonly linked to the multiple disabilities or traumatic brain injury category. Both parties have wasted tremendously valuable hearing time and judicial resources accusing each other of using the wrong label when there is little dispute regarding the student's global delays and special education needs that derive therefrom—regardless of whether those needs were initially resulted from a brain-based trauma or disorder or from a developmental delay. Neither the public programming nor iBrain was required to reverse the underlying causes of the student's disability and neither offers services to that effect, and the issue as presented by the parties to the IHO was nothing more than a red herring. In this case, the IHO erred by placing undue weight on the student's disability diagnoses and classification as well iBrain's general brochure as a school that addresses brain injuries to conclude that iBrain was inappropriate (see Parent Ex. H). iBrain went to the trouble of developing a 30-page written plan for addressing this particular student's special education needs that mimics nearly all of the elements of a public school IEP, and the IHO should have focused on the evidence that was unique to the student and his programming before taking the parents to task using iBrain's general brochure (see Parent Ex. E).

The IHO's reliance on State regulation that requires a minimum number of academic hours per week for each student as a basis for determining that iBrain was inappropriate for the student is likewise, erroneous. The district raised this argument in its closing brief to the IHO. The district argued from a technical, regulatory standpoint that iBrain was not an appropriate placement, in part, because it lacked sufficient academic instruction that would comply with State regulation, asserting

that an instructional day for students in grades seven through twelve must be five and one-half hours and although less specific the district continues to press the argument on appeal (see 8 NYCRR 175.5). However, the district's argument was improper and the IHO erred in relying on it insofar as the express purpose of that regulation is "intended to provide school districts with flexibility in meeting the 180-day requirement in order to receive State aid pursuant to Education Law §§ 1704(2) and 3604(7)" for all student's whether disabled or not (8 NYCRR 175.5[a]), and not as a weapon to ward off private school placements made by parents of children with disabilities when a school district has already denied the student a FAPE. Thus, the district's argument is not persuasive because iBrain is not a school district, but is a unilateral placement and, therefore, generally "need not meet state education standards or requirements" to be considered appropriate to meet a student's special education needs under the IDEA (Frank G., 459 F.3d at 364; see Carter, 510 U.S. at 13-14). Although the student is a high school student, chronologically speaking, the district's argument that too much of the school day at iBrain was focused on related services ignores the fact that the student is, in many respects, appropriately working on basic developmental and preacademic skills in virtually all of his special education programming. Some of the student's skill deficits in his activities of daily living are appropriately addressed by a licensed related services provider such as a physical therapist or occupational therapist, but in many other instances in this case, such as communication and expressive language goals, either a related service provider such as a speech language therapist or a special education teacher could implement the student's goals.

With respect to the IHO's finding that iBrain was inappropriate because it did not provide the student with access to nondisabled peers (IHO Decision at p. 16), it is well settled that although the restrictiveness of a parent's unilateral placement may be considered as a factor in determining whether parents are entitled to an award of tuition reimbursement (M.S., 231 F.3d at 105; Walczak, 142 F.3d at 122; see Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]), parents are not as strictly held to the standard of placement in the LRE as are school districts (C.L., 744 F.3d at 830, 836-37 [noting "while the restrictiveness of a private placement is a factor, by no means is it dispositive" and furthermore, "[i]nflexibly requiring that the parents secure a private school that is nonrestrictive, or at least as nonrestrictive as the FAPE-denying public school, would undermine the right of unilateral withdrawal the Supreme Court recognized in Burlington"]; see Carter, 510 U.S. at 14-15; M.S., 231 F.3d at 105 [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]) and "the totality of the circumstances" must be considered in determining the appropriateness of the unilateral placement (Frank G., 459 F.3d at 364). In this case, access to nondisabled peers is not a significant factor at all, especially since the district recommended placing the student in a special class in a specialized school.¹⁵ There is no dispute that the student would not be have been educated alongside his nondisabled peers regardless of whether he was placed in a specialized public school or in a nonpublic school—in other words the student's access to nondisabled peers in terms of the continuum of alternative placements was unchanged from the public school to the nonpublic school (see 8 NYCRR 200.6[h][4][iii]). In both instances, the student was not being, or envisioned to be, educated with his nondisabled peers. The

¹⁵ According to the sections of the December 2018 and November 2019 IEPs identifying the student's participation with nondisabled peers, the student's "severe disability precludes assessment of skill in the general education environment" (Dist. Exs. 12 at p. 22; 19 at p. 18).

district's arguments on LRE in its post hearing brief before the IHO were specious, and the IHO should have recognized them as such.

Based on the above, the IHO erred in using these three factors for finding iBrain an inappropriate unilateral placement for the student, and that portion of his determination must be reversed. Having determined so, it is still necessary to determine if iBrain was substantively an appropriate unilateral placement.

According to the 2019-20 iBrain IEP, the student attended a 6:1+1 class with a 1:1 paraprofessional and was learning to communicate using a Tobii eye gaze device (Parent Ex. E at p. 1). The IEP developed by iBrain stated that the student presented with "very significant academic, communicative and social/interpersonal needs" and indicated that he required intense support and continual adult supervision (*id.* at p. 2). Additionally, the iBrain IEP noted that the student participated in individual and small group activities, class projects and school events, and required hand-over-hand assistance to participate in classroom tabletop activities (*id.*). The 2019-20 iBrain IEP reported that the student had a short attention span, was easily distracted and had "trouble keeping his mind on work for long" (*id.*). Furthermore, the student demonstrated fleeting attention to teacher directed instructional activities and required repeated prompts for attention, additional time, and assistance to complete classroom tasks (*id.*).

The 2019-20 iBrain IEP indicated that the student was able to use multiple strategies and all available senses to explore and learn from the environment, could follow moving objects, shift attention from one object to another, visually track an object horizontally and vertically, visually search for sounds, and explore with his hands (Parent Ex. E at p. 2). According to the iBrain IEP, the student increased his ability to make independent choices between two objects when given guidance and support (*id.*). Finally, the student demonstrated difficulty using his hands and eyes in coordination (*id.*).

With regard to language skills, the 2019-20 iBrain IEP indicated that the student presented with severe delays in his receptive and expressive communication skills, which affected his ability to communicate functionally (Parent Ex. E at p. 2). The IEP indicated the student was nonverbal; however, he could communicate through facial expressions, vocalizations, body movements, and eye gaze (*id.*). Additionally, with guidance and support, the student could respond to a caregiver's visual, verbal, tactile, and physical prompts (*id.*). The 2019-20 iBrain IEP indicated that the student was able to respond to variable stimulus in the direction of the source; turn his head towards the direction of the sound; indicate interest in a toy or object through eye gaze, reaching and gesture; respond to simple verbal requests and point to an object or picture when it was named; and to follow simple instructions (*id.*).

Regarding communication, the 2019-20 iBrain IEP indicated that the student did not have a functional means of communication, was dependent on family and caregivers to anticipate his wants and needs and he did not demonstrate any spontaneous or cued phonation (Parent Ex. E at p. 3). The speech-language pathologist noted that the student had been experiencing difficulty using a Tobii eye gaze at his previous school, and opined that after a trial of the device, it was suspected that his cognitive and/or visual impairments may have impacted his ability to access the device (*id.* at pp. 3-4). The speech-language pathologist described that, during an evaluation, the student presented with significant concerns related to both oral motor and pharyngeal components of his

swallowing (id.). Based on the results, the speech-language pathologist recommended a modified barium swallow study be completed at a medical center, and once completed and the report was received, speech-language pathology would advise on a recommended diet (id.).

The 2019-20 iBrain IEP indicated that the student responded to his name, greeted familiar people with an appropriate gesture (smiling) and vocalizing, could appropriately react to tone of voice or some facial expressions, could look at a person who was talking, and was increasing his ability to pay attention to speech (Parent Ex E at p. 2). In literacy, the IEP indicated that the student demonstrated consistent progress identifying words and pictures of common objects in his everyday environment (i.e., pants, shirt, shoes, etc.) (id. at p. 3). Additionally, he had made progress in listening skills and answering comprehension questions following texts by eye gazing or using his communication system (id.).

In terms of academic strengths, the 2019-20 iBrain IEP indicated that the student had made gains in many academic areas; however, he required a modified environment with reduced visual and sound distractions in combination with individual and small group instruction (Parent Ex. E at p. 3). Specifically, the IEP indicated that the student could: recognize familiar objects, people, and places; show anticipation of regularly occurring events in everyday care (e.g., feeding, dressing, undressing); participate in simple games; use a BIGmack switch to answer simple questions and label various objects with hand-over-hand assistance; visually search for sounds; and make a choice between two objects (id.). His gaze lingered where an object or person disappeared (id.). The 2019-20 iBrain IEP noted that the student was highly distractible, and it was challenging for him to attend to academic tasks in a large group setting (id.). Additionally, the student's accuracy during his academic performance improved when prompted to "look before pointing" and directed to visually select his answer before pointing to it (id.). The IEP indicated that the student continued to require specialized settings and redirection to tasks to keep him on task during academic activity, noting that his "social and inquisitive nature result in higher distractibility" and that it was difficult for him to remain engaged if he noticed movement or sound in the room (id.). Furthermore, the student did best when shielded from visual distractions, and the iBrain IEP suggested that temporary removal of distractors through the use of a screen increased his ability to remain engaged and participate in activities (id.).

With regard to OT, the 2019-20 iBrain IEP indicated that the student participated in several adapted sports programs and received home and school therapy services (Parent Ex. E at p. 4). The occupational therapist reported that the student presented with impaired muscle tone, decreased strength and endurance, and exhibited minimal grasping, visual motor, and bilateral skills—which impacted his participation in educational, leisure, and self-care occupations (id.). The occupational therapist indicated that the student required additional time for preparatory stretching and proper positioning due to his impaired processing time, assistance of a 1:1 paraprofessional in addition to the therapist for assistance with transfers and environmental modifications due to the above listed impairments (id.). Additionally, the therapist noted that the student required frequent rest breaks, repetitive trials, a quiet non-distracting environment, and opined that he performed best in pull-out sessions and was working towards improved attention and participation in louder busier environments (pushing into the classroom) (id.).

The 2019-20 iBrain IEP indicated that in fine motor, the student utilized both hands equally when given the opportunity and provided hand over hand assistance; however, he had not yet

demonstrated an established hand dominance (Parent Ex. E at p. 9). Additionally, the student participated in functional activities that incorporated reaching and a gross grasp with hand over hand assistance but had not yet progressed to a voluntary release or digit isolation during functional activities (id.). The occupational therapist opined that the student enjoyed tactile sensory exploration of a variety of textures, and that his impaired fine motor coordination impacted his participation in school, self-care, and play and leisure activities (id.).

The 2019-20 iBrain IEP indicated that in PT the student was making "slow but steady progress towards his IEP goals" (Parent Ex. E at p. 5). The physical therapist reported that the student had significant deformities of both ankles and feet, with the right being greater than the left, and indicated that he had received new solid ankle-foot orthotics (AFOs) to position his feet and ankles for supported sitting and standing (id.). The physical therapist indicated that the first 15 minutes of a session was a 2-person transfer to the mat followed by visual inspection of his feet for any red areas or skin breakdown; the next 15 minutes was donning orthotics and passive range of motion for hip external rotators, hamstring and hip flexors and lateral trunk; the next 15 minutes was supported sitting on a bench and joint mobilization techniques were used for spine and upper extremities; and the last 10 minutes were for doffing orthotics, skin check, transfer to his activity chair, and positioning him in the chair (id.). The physical therapist indicated that the student participated in functional activities like rolling, maintaining therapeutic kneeling and quadruped position, and noted that he was able to maintain his head up while propped up on his forearm for 15 minutes (id.). The therapist also indicated that the student enjoyed passive riding of the bike around the school lobby (id.). The student required maximum assistance to sit on the bench with bilateral AFOs and feet supported on a step; and that he initiated rolling by turning his head but required moderate to maximum assistance to roll supine to prone and prone to supine (id.). Finally, the physical therapist indicated that the student tolerated stretching of his lower extremities and mobilization of his pelvic and shoulder girdle and he had a calm demeanor during therapy sessions (id.).

With regard to vision education services, the 2019-20 iBrain IEP present levels of performance indicated that during a functional vision assessment, challenges in binocular coordination were evident as the student's right eye sometimes turned up and outward (Parent Ex. E at p. 5). Additionally, he exhibited weakness moving both eyes in unison smoothly, quickly and efficiently and did not perform tracking activities in full range as he tended to lose the target midrange (id.). The student visually alerted to targets on his right peripheral field with a latent response on his left; and had a significant trunk and head tilt to the right, which impacted his visual field awareness on his left side (id.). Additionally, when given prompts the student demonstrated skills to shift his gaze between two objects at eye level and at near distance, "yet with latency"; and he attended to visual targets up to 36 inches away, but was not observed to attend at further distances (id.). The evaluator indicated that the student visually gazed at simple color photographs but was not observed to attend to salient features or identify them when named (id.). The student established eye contact when spoken to and was noted to intently visually observe his caregiver prepare his food for lunch (id.). The evaluator opined that the student seemed to have difficulty sustaining visual attention during presented tasks, especially when background noise or voices were present, noting that he tended to look up and away from materials (id.). Finally, the 2019-20 iBrain IEP indicated that the student gazed in the direction of a show being played on an iPad, but did not directly focus on it and that he demonstrated visual attraction toward overhead lighting as he would gaze at the overhead lights when not interacting with an adult (id. at pp. 5-6).

The 2019-20 iBrain IEP further indicated that the student seemed to enjoy social interaction and, at times, watched the activities of others within close range and demonstrated visual curiosity toward a wide range of visual materials (Parent Ex. E at p. 6). The evaluator indicated that the student's binocular coordination was unstable which could cause a shortened visual attention span, confusion in the interpretation of visual spatial relationships, limit peripheral vision, and limit the ability to visually scan the environment quickly and accurately, which caused frequent visual fatigue (id.). The evaluator suggested that tasks requiring sustained visual attention should occur in environments with minimal background noise, and that the student needed frequent breaks from visual work and extra time to process visual information, prompts to return to task when distracted, and materials presented at eye level, slightly left on midline, within three feet, with solid colored, contrasting backgrounds, to support focus (id.). Finally, the evaluator suggested that the student required a TVI to consult with the interdisciplinary team (id.).¹⁶

With regard to assistive technology, the 2019-20 iBrain IEP indicated that the student had been utilizing the Tobii eye gaze in conjunction with a Microsoft Surface tablet, and noted that he was able to use the device to play cause and effect games (Parent Ex. E at p. 6). The evaluator opined that when energized and attentive, the student was able to focus his attention on the object and dwell until the item was selected; however, he needed moderate to maximum cueing with this task (id.). Additionally, the IEP indicated that the student was still learning how to use the device and would continue to require verbal encouragement, and that following attainment of these skills using the games built into the device he would progress to yes and no questions as well as other higher levels of communication using his device (id.). The evaluator described the student as "an extremely social individual who enjoy[ed] talking with others, as well as listening to music" and opined that he performed best in a quiet area with minimal distractions (id.). According to the 2019-20 iBrain IEP, the student's father reported that it took "a lot of effort" for the student "to look" and that the eye gaze based communication device had not been very successful (id.). The student's father felt that the student needed to develop better control of his eye movements so he could effectively activate his communication device (id.).

The 2019-20 iBrain IEP present levels of social and cognitive functioning indicted that the student required 1:1 assistance to fully participate in classroom activities because he needed constant refocusing and redirection to the activity (Parent Ex. E at p. 6). Additionally, the student demonstrated delayed fine motor, visual motor, visual perceptual, gross motor, and cognitive skills, as well as delayed attention, motor coordination, strength, and sensory processing abilities (id.). Finally, the IEP indicated that the student required maximum assistance with ADLs and was dependent for ADLs such as dressing, bathing, and toileting (id.).

The 2019-20 iBrain IEP indicated that the student engaged in individual and group activities; could communicate with facial expressions, vocalization, body movements, and eye gazing; with guidance and support, he could express wants and needs by eye gazing when presented with two pictures, tangible cues, or objects, or by using adapted devices; demonstrated enjoyment of an activity or a person by facial expressions or vocalization; developed book knowledge and appreciation; demonstrated interest in stories read aloud or audio version; demonstrated an

¹⁶ While not defined in the hearing record, the acronym TVI is sometimes used to refer to a teacher of the visually impaired.

understanding that illustrations and print convey meaning; showed growing interest in reading related activities; with guidance and support, tolerated transition from high energy to low energy activities; with verbal prompts and hand over hand assistance, was able to complete activities that combined motor movements with equipment; could engage in teacher-initiated activities; could shift attention from one object to another; with verbal prompts, visual and auditory cues, and/or hand-over-hand assistance, was able to follow rules when making a choice, following directions, or playing games; and could interact positively with others regardless of personal differences (Parent Ex. E at p. 7).

The 2019-20 iBrain IEP contained approximately 14 annual goals, each with short-term objectives, designed to improve the student's skills in: using a voice output switch and AAC to identify "yes" and "no" and numbers 1 and 2; using a voice output switch and AAC to greet a peer given maximal support; performing visual tracking skills with speed and accuracy in controlled environments; visually scanning an array of up to eight well-spaced bright single colored visual targets at near distance using spotlighting and high contrast backgrounds; improving receptive language skills by following simple single-step commands and auditory discrimination or identification; expanding his expressive language skills by demonstrating understanding of cause and effect with minimal cues; enhancing social and pragmatic skills through facial expressions to participate in social activities (i.e., greet peers or teachers) across all academic contexts; rolling from his back to his belly and the reverse to both sides with moderate assistance to be able to assist caregivers during hygiene care; performing sit to stand from a bench with moderate support for four out of five trials to assist with transfers in and out of his wheelchair for increased independence in the classroom; increasing participation in academic and classroom activities in the school environment as evidenced by meeting 100% of objectives; increasing participation in leisure activities throughout the school day as evidenced by meeting 100% of leisure or play objectives; and improving self-care skills within the school environment to increase his functional independence within his daily routine and reduce support required by caregivers and family (Parent Ex. E at pp. 15-27). The 2019-20 iBrain IEP also contained two annual goals for the paraprofessional to consistently consult with the special education teacher and therapists regarding close monitoring of the student's academic and therapeutic needs (*id.* at pp. 24-25). Additionally, the 2019-20 iBrain IEP contained a coordinated set of transition activities along with an annual goal and short-term objectives to help the student explore vocational opportunities in the classroom, school, and wider school community (*id.* at pp. 25-26).

The 2019-20 iBrain IEP recommended the student attend a 6:1+1 special class with a 1:1 paraprofessional for the 12-month school year and receive the related services of OT four times per week for 60 minutes individually, PT five times per week for 60 minutes individually, speech-language therapy five times per week for 60 minutes individually, vision education services two times per week for 60 minutes individually, direct assistive technology services one time per week for 60 minutes individually, and parent counseling and training one time per month (Parent Ex. E at

pp. 18, 20, 21, 23, 29).^{17, 18} Additionally, the IEP recommended the following assistive technology devices: an AAC device, AAC wheelchair mount and switches, switch mounts, computer, computer switch interface, software, and adaptive seating (*id.* at pp. 29-30). Finally, the iBrain IEP recommended the following supports for school personnel of behalf of the student: two person transfer training, training for seizure safety, training for use of braces and orthoses, training for vision impairment adaptations, training for assistive technology, and training for feeding precautions and safety (Parent Ex. E at p. 30).

F. Equitable Considerations

Next I turn to a review of whether the parents' request for relief is supported by equitable considerations, again an alternative finding that is not dispositive in light of my determination that the district offered the student a FAPE with respect to the IEP's developed during the 2018-19 and 19-20 school years. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; *see Carter*, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

In this case, the hearing record does not support a finding that the parents interfered with the CSE's ability to meet and create an IEP for the student. While I note that the parents failed to provide timely notice of disagreement and unilateral placement, and such untimeliness may merit a reduction of in awarding relief, the district does not assert that as a defense, and in this particular case I decline to exercise my discretion to do so independently. Furthermore, the district does not assert that the

¹⁷ While the 2019-20 iBrain IEP states "iBrain recommends and [p]arent agrees and requests this [s]tudent be placed in a 6:1:1 class in a New York State Education Department-approved non-public school in order to address the [s]tudent's highly intensive management needs" (Parent Ex. E at p. 28), I note that iBrain is not an approved nonpublic school (*see* <http://www.p12.nysed.gov/specialed/privateschools/853-statewide.htm>).

¹⁸ The recommended services page of the iBrain IEP suggested that the student receive speech-language therapy five times per week, while the body of the IEP suggested that he receive speech-language therapy three times per week (Parent Ex. E at pp. 20, 29). The iBrain director of special education reported that the student received four, sixty-minute sessions of speech-language therapy per week during the 2019-20 school year (Parent Ex. M at p. 3).

costs of tuition at iBrain, the separate costs of the related services, and the cost of transportation services are excessive, and therefore, I find that equitable considerations would not weigh against an award of reimbursement for the costs of the student's placement at iBrain in the event that it was necessary to reach this issue.

VII. Conclusion

Based on the evidence in the hearing record, although most of the parents' claims related to the 2017-18 school year are outside of the statute of limitations period, the implementation claims for the period after April 2018 were timely and the district failed to establish that it implemented the home-based OT services recommended in the November 2017 IEP; accordingly, the student should receive compensatory education for the missed services. However, there is no basis to overturn the IHO's conclusion that the district offered the student a FAPE with regard to the parents' claims that fell within the 2018-19 and 2019-20 school years. Additionally, if it were necessary to address the IHO's findings regarding the second and third Burlington/Carter criteria those findings are noted in the alternative above for the benefit of the parties and the potential for judicial review, but in light of the parents' failure to prevail on the first criterion they are not the dispositive determinations in this appeal.

I have considered the parties' remaining contentions and find that I need not resolve them in light of my decisions herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated April 11, 2021 is modified by reversing that portion which found that the student was provided a FAPE throughout the 2017-18 school year; and

IT IS FURTHER ORDERED that unless the parties otherwise agree, the district shall provide the student with compensatory education in the form of 16 hours of home-based OT services to remediate missed services after April 30, 2018.

Dated: Albany, New York
July 6, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER